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IN THE

Supreme Court of the United States

October Term, 1963

No. 255

BROS INCORPORATED,

Petitioner

vs.

BROWNING MANUFACTURING COMPANY and SHOVEL SUPPLY CO., INC.,

Respondents

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Respondents pray that this Court deny the Petition for a Writ of Certiorari.

OPINIONS IN THIS CASE

The decisions of the lower courts holding the patent invalid appear at 134 USPQ 231 (D. Minn. 1962), 317 F. 2d 413, 137 USPQ 624 (8th Cir. 1963); and at R. 21-34 and pp. A-1-A-9 Appendix to Petition for Certiorari, respectively.

OPINIONS IN RELATED CASES

The decisions of the Sixth Circuit courts holding the patent valid appear at 116 USPQ 138 (N.D. Ohio 1957), 264 F. 2d 776 (6th Cir. 1959), cert. denied 360 U.S. 929 (1959).

The decisions of the Fifth Circuit courts holding the patent valid appear at 158 F. Supp. 786 (N.D. Tex. 1958), 261 F. 2d 428 (5th Cir. 1958).

The decision of the Court of Appeals for the Fifth Circuit, granting leave to its trial court to reopen and determine what equitable relief should be afforded to the alleged infringers because of the prior publication which was not before that Court when it sustained the validity of the patent, appears as *Bros Incorporated v. W. E. Grace Mfg. Co.*, __F. 2d__, 138 USPQ 357 (5th Cir. 1963).

STATUTES INVOLVED

35 U.S.C. 102(b), reprinted at p. A-20 of Appendix to Petition for Certiorari, is the statute upon which the patent was held invalid.

35 U.S.C. 101, 103, and former 35 U.S.C. 31, appearing at pp. A-19-A-21 of Appendix to Petition for Certiorari, are discussed by the parties in their briefs.

COUNTERSTATEMENT OF THE CASE

Proceedings In The District Court

The trial court held the patent invalid (R. 53) after finding (R. 50-51) that the invention was disclosed in Petitioner's own publication, "50 Ton Compactor With Oscillating Wheels" (R. 161-164) more than one year

prior to filing patent application, as prohibited by 35 U.S.C. 102(b).

Prior to making this finding, the trial court heard expert testimony regarding what the publication disclosed to a person with skill in the art (R. 73, 83-103, 141, and S.R. 1-3, 5, 9-10, 17-18), and also considered that the patentee had referred to this same publication as a "catalog disclosure of the invention" during Patent Office prosecution (R. 29-30, 139-141, 186, 194).

The trial court denied (R. 52) Petitioner's motion for amended findings and conclusions (R. 44-49), which proposed findings alleged that certain of the claim elements are not disclosed in the publication.

Proceedings In The Eighth Circuit

The Court of Appeals for the Eighth Circuit examined and accepted the findings and conclusions of the district court, and concluded that the findings were supported by substantial evidence.

The Eighth Circuit also considered Petitioner's argument that 35 U.S.C. 103 requires that a publication under 35 U.S.C. 102(b) must identically disclose every element of a patent claim to be an invalidating reference. Petitioner's contention was rejected by the Eighth Circuit because of the "plain, obvious and rational meaning" of 35 U.S.C. 102(b), and also because the legislative history of the 1952 Patent Act refutes the contention that 35 U.S.C. 103 was intended to modify or affect in any way 35 U.S.C. 102(b), citing cases prior to and subsequent to the 1952 Patent Act which hold that a prior publication need only describe the invention sufficiently to enable one with skill in the art to carry the invention into practical use.

Proceedings In Related Cases

The courts of the Fifth[1] and Sixth[2] Circuits had no knowledge of the invalidating publication (R. 161-164) at the time they held the patent valid.

Following those decisions, the alleged infringers in the Fifth and Sixth Circuit cases attempted to have those cases reopened for a consideration of the newly discovered evidence of Petitioner's publication (R. 161-164). Petitioner successfully avoided reopening by submitting affidavits to the effect that its publication had not been published until **long after** the critical date asserted by the alleged infringers, and on the further grounds that the alleged infringers had made no proper showing of why the newly discovered evidence had not been presented earlier. Accordingly, the Sixth Circuit denied reopening "in view of the availability of the claimed material in earlier proceedings" (R. 199-202).

For a complete discussion of the motions to reopen before the Fifth and Sixth Circuits, see *Bros Incorporated* v. *W. E. Grace Mfg. Co.*, ___F. 2d___, 138 USPQ 357 (5th Cir. 1963), in which that court recently directed its trial court to consider what equitable relief should be granted to those alleged infringers because of the invalidating prior publication. With respect to Petitioner defending those motions on the grounds that the publication was not distributed at the 1948 Road Show, the Court stated: "In the light of subsequent developments, a court might well conclude that there was a **positive misrepresentation** of the true facts."[3] (Emphasis added.)

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[1]158 F. Supp. 786, 261 F. 2d 428 (5th Cir. 1958).

[2]116 USPQ 138, 264 F. 2d 776 (6th Cir. 1959).

[3]138 USPQ 357, 362 (5th Cir. 1963).

PETITIONER'S QUESTIONS

Petitioner's six questions contain implications not supported by the fact findings, and in most instances are contorted and misleading.

1. Petitioner's Question 1 implies that the courts "disregarded" the limitations in the patent claims, which is incorrect.

2. With respect to Question 2, the courts below did not in any way **modify** 35 U.S.C. 102(b) in passing on its plain meaning.

3. Question 3 is fairly stated, but should be answered "No" for the reasons given hereinafter.

4. Question 4 is vaguely stated. It was not found that the patent satisfies all conditions set forth in 35 U.S.C. 102(a) and (c)-(g); it was only found that there was no abandonment. The courts did not find that the invention is "not identically disclosed or described" in Petitioner's publication.

5. Petitioner's Question 5 is misleading with respect to the feature of alleged non-reduction to practice, because the court made no finding of **when** the alleged invention was reduced to practice.

6. Question 6 asks this Court to try the case **de novo**.

These questions are discussed in further detail below.

SUMMARY OF REASONS FOR DENYING CERTIORARI

1. The asserted conflict between the decision below and the decisions of the Fifth and Sixth Circuits arises from differences in states of **fact**, and not in the application of a principle of law. Inasmuch as the publication on which the Eighth Circuit courts invalidated the patent was not before the courts of the Fifth and Sixth Circuits at the time they held the patent valid, the decisions in those circuits were based on different facts and accordingly there is no conflict.

2. Subsequent to the Eighth Circuit decision, the Fifth Circuit held that its district court shall hold a hearing under F.R. Civ. P. 60(b) to determine what equitable relief the alleged infringers shall have from the operation of its prior judgment.

3. The decisions below do not conflict with the plain wording of 35 U.S.C. 102(b).

4. The Eighth Circuit did not interpret 35 U.S.C. 102(b) and 103 inconsistently with the Sixth Circuit.

5. There is no difference between the opinions of the courts below and the Sixth Circuit in construing the patent claims, as the trial court below cited the Sixth Circuit opinion and agreed with it (R. 23-25).

6. The Eighth Circuit followed established case law tests in determining that the disclosure in the publication was sufficient to invalidate the patent.

7. Many of the Questions Presented by Petitioner imply "facts" that have not been found.

8. In essence, Petitioner asks this court to disregard F.R. Civ. P. 52(a) and set aside the trial court's finding

of fact that the prior publication discloses the invention, which finding was amply supported by the evidence.

9. The question of whether a reference must describe a device which has been constructed and successfully tested has already been settled, and 35 U.S.C. 102(b) makes no such requirement.

10. The question of law presented by Petitioner is an attempt to contort the meaning of 35 U.S.C. 102(b), which attempted construction was considered by the Eighth Circuit and decided against the Petitioner because of the plain meaning of the statute, the legislative history of the statute, and accepted case law tests for determining the adequacy of description in a prior publication.

11. No valid issues of public importance are presented by Petitioner, and the only real issue is one of money damages between the parties.

12. This court has previously denied[1] a petition for certiorari in a case involving the same patent here in suit, although the questions presented differ from those here presented.

ARGUMENT FOR DENYING CERTIORARI

No True Conflict Is Presented

Although the courts below held the patent invalid and the courts of the Fifth and Sixth Circuits had previously held the same patent valid, there is no true conflict between these decisions for the following reasons.

The courts below held the patent invalid under 35 U.S.C. 102(b) because the alleged invention was described in Petitioner's publication (R. 161-164), which Petitioner

[1] 360 U.S. 929 (1959)

distributed more than one year prior to filing its patent application (R. 53). **This publication was not before the courts of the Fifth or Sixth Circuits when they held the patent valid.** Thus, the Fifth and Sixth Circuit decisions stand upon an entirely different foundation from the decisions below.

As in *Wisconsin Electric Co.* v. *Dumore Co.*, 282 U.S. 813 (1931), "the asserted conflict in decisions arises from differences in states of fact, and not in the application of a principle of law," and the petition for certiorari should be denied.

In *Smith* v. *Hall*, 301 U.S. 216, 218 (1937), this Court affirmed a Second Circuit decision holding the patent invalid because of a prior use defense that had not been "presented or considered" when this Court had earlier sustained the validity of the same patent in a suit involving different parties.

Furthermore, it is clear that granting certiorari is not warranted just by reason of the fact that two different circuit courts have reached different results as to the validity of the same patent. See *Aeronautical Communications Equipment, Inc.* v. *Pierce*, 371 U.S. 954 (1963), denying certiorari. In that case, the Fifth Circuit[1] had held Pat. Nos. 2,133,642 and 2,133,646 **valid**, and certiorari was denied, although the First Circuit had held Pat. No. 2,133,642 **invalid** on three occasions[2]; the Third Circuit

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[1] *Pierce* v. *Aeronautical Communications Equipment, Inc.*, 307 F. 2d 790 (5th Cir. 1962).

[2] *American Communications Co., Inc.* v. *Pierce*, 208 F. 2d 763 (1st Cir. 1953), cert. denied 347 U.S. 944 (1954); *Pierce* v. *Hewlett-Packard Co.*, 220 F. 2d 531 (1st Cir. 1955), cert. denied 350 U.S. 833 (1955); *Pierce* v. *American Communications Company, Inc.*, 280 F. 2d 278 (1st Cir. 1960), cert. denied 364 U.S. 902 (1960).

had held Patent No. 2,133,642 **invalid**[1]; the First Circuit had held Pat. No. 2,133,646 **invalid**[2]; the Petitioner sought certiorari on the grounds of conflict[3]; and Respondent admitted[4] the conflict.

It cannot be said that the refusal of the Sixth Circuit to reopen (R. 199-202), following the denial of certiorari, amounts to a holding by the Sixth Circuit that Petitioner's publication (R. 161-164) does not disclose the invention. The Sixth Circuit did not discuss the merits or demerits of the publication. Motions to reopen following judgment are always addressed to the discretion of the court, and the requirements for reopening, such as why the newly discovered evidence was not earlier presented, are entirely different from a court considering a defense that has been properly raised at trial. Furthermore, Petitioner forgets to mention to this Court that it defended those motions on the grounds that the publication had not been distributed at the time asserted by those alleged infringers. See the recent

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[1]*Pierce* v. *Allen B. DuMont Laboratories, Inc.*, 297 F. 2d 323 (3rd Cir. 1961), cert. denied 371 U.S. 814 (1962).

[2]*Pierce* v. *American Communications Company, Inc.*, 280 F. 2d 278 (1st Cir. 1960), cert. denied 364 U.S. 902 (1960).

[3]See p. 5, Petition for Certiorari, filed Oct. 24, 1962, in *Aeronautical Communications Equipment, Inc.* v. *Pierce*, October Term, 1962, No. 558.

[4]See pp. 2-3, Respondent's Brief In Part Support of the Petition, filed Nov. 5, 1962, in *Aeronautical Communications Equipment, Inc.* v. *Pierce*, October Term, 1962, No. 558.

Fifth Circuit decision[1] for a discussion of Petitioner's use of doubtful affidavits in defending against those motions.

The decisions below take cognizance of the earlier refusals of the Fifth and Sixth Circuits to reopen, and adequately distinguish these refusals.

Moreover, the Fifth Circuit[1] pointed out that the trial court in the present case had "correctly" attributed little, if any, weight to the refusals of the Fifth and Sixth Circuits to reopen.

Accordingly, no conflict exists, as the courts below are the only ones which have passed upon the merits of Petitioner's invalidating publication.

Decision Is In Accord With The Plain Meaning Of 35 U.S.C. 102(b)

The pertinent portion of 35 U.S.C. 102(b) reads:

"A person shall be entitled to a patent unless —

(b) the invention was . . . described in a printed publication in this or a foreign country . . . more than one year prior to the date of the application for patent in the United States . . . ."

That statute does not say "identically disclosed or described", but simply prevents the invention from being described in a printed publication, leaving to the courts the task of finding in each individual case what constitutes a sufficient description.

In interpreting 35 U.S.C. 102(b) according to its plain meaning in the present case, the Eighth Circuit stated:

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[1] *Bros Incorporated* v. *W. E. Grace Manufacturing Company*, ___ F. 2d ___, 138 USPQ 857 (5th Cir. 1963).

"As this Court, not infrequently in the past has said:

'***[T]he plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover.'" (p. A-8 Appendix to Petition).

No Conflict In Statutory Interpretation

Petitioner alleges that the Eighth Circuit interpreted 35 U.S.C. 102 and 103 in direct conflict with the conclusion reached by the Sixth Circuit.

An examination of the Sixth Circuit case[1] will show that court passed only on the question of obviousness (35 U.S.C. 103), not mentioning 35 U.S.C. 102(b) or printed publications.

Conversely, the Eighth Circuit[2] affirmed the holding of invalidity under 35 U.S.C. 102(b). 35 U.S.C. 103 and its legislative history were considered by the Eighth Circuit only in refuting the Petitioner's contention that 35 U.S.C. 103 modifies and affects 35 U.S.C. 102(b).

No Conflict In Claim Construction

No differences exist between the courts of the Sixth and Eighth Circuits in construing the patent claims.

The Sixth Circuit concluded, on the basis of the art before it, that the claims were not to obvious subject mat-

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[1]*Gibson-Stewart Co. v. Wm. Bros Boiler & Mfg. Co.*, 116 USPQ 138 (N.D. Ohio 1957), 264 F. 2d 776 (6th Cir. 1959), cert. denied 360 U.S. 929 (1959).

[2]*Bros Incorporated v. Browning Manufacturing Co. et al*, 317 F. 2d 413, 137 USPQ 624 (8th Cir. 1963).

ter. The district court below quoted from the Sixth Circuit decision and agreed with it (R. 24), and stated that were it not for the defense of prior publication it would be without misgivings as to the validity of the patent (R. 25).

Established Case Law Followed

The Eighth Circuit followed established case law tests for the sufficiency of disclosure required of a prior publication for it to invalidate a patent, citing *Collins* v. *Owen*, 310 F. 2d 884, 887 (8th Cir. 1962), and *Midland Flour Milling Co.* v. *Bobbitt*, 70 F. 2d 416, 418 (8th Cir. 1934).

See also *Maibohm* v. *RCA Victor Co.*, 89 F. 2d 317, 319-320 (4th Cir. 1937), and cases therein cited on the same point.

See also *Application of Pappas*, 214 F. 2d 172, 177 (CCPA 1954) to the effect that an invalidating publication need only "disclose the same inventive concept" as the patent.

Whether these courts were deciding their cases under 35 U.S.C. 102(a), (b) or the pertinent portions of earlier statutes from which 102(a) and (b) were derived, such as former 35 U.S.C. 31 (R.S. 4886), is of no consequence, as the law regarding sufficiency of a description in a prior publication is unchanged.

Petitioner's Attempt To Contort 35 USC 102(b)

Petitioner attempts to present a question of law in contending that 35 U.S.C. 102(b) is modified by 35 U.S.C. 103, to require that every element and functional statement of a patent claim must be "identically disclosed or described" in the prior publication to defeat the patent under 35 U.S.C. 102(b).

This is a strained and unwarranted construction of 35 U.S.C. 102(b), and an attempt to contort the meaning of that statute, which Respondents answer as follows:

1. Prior and subsequent to the 1952 Patent Act, the case law has been to the effect that an invalidating publication need only teach a person skilled in the art to carry out the invention to a practical extent.

2. The plain language of 35 U.S.C. 102(b) makes no requirement with respect to "identically disclosed or described", and it must be assumed that if Congress wished to engraft such a limitation upon the statute, it would have used these words in the statute.

3. The legislative history of 35 U.S.C. 102 and 103, as given in the Eighth Circuit decision, makes it clear that Congress had no legislative intent to change the prior case law requirements with respect to disclosure in a printed publication.

Petitioner's Attempt to Upset Fact Findings

F.R. Civ. P. 52(a) provides that ". . . findings of fact shall not be set aside unless **clearly erroneous** . . . ." (Emphasis added.) This Court follows the "clearly erroneous" requirement, *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 341-342 (1949).

Also, this Court has the additional requirement that it must be a **strong** case for it to set aside findings when made by a district court, and examined and accepted by a court of appeals, *Goodyear Tire & Rubber Co., Inc.* v. *Ray-O-Vac Co.*, 321 U.S. 275, 278 (1944).

The trial court found as a fact that Petitioner's pamphlet discloses the invention to one skilled in the art (R. 50-51) and concluded as law (R. 53) that the patent is

invalid. The Eighth Circuit affirmed, and concluded that there was "a substantial evidentiary basis" for the trial court's finding.

Whether a publication describes an invention is a proper fact finding and invalidity is a conclusion of law. *Maibohm* v. *RCA Victor Co.*, 89 F. 2d 317, 320 (4th Cir. 1937); *Armour Research Foundation* v. *C. K. Williams & Co.*, 280 F. 2d 499, 501, 503 (7th Cir. 1960); *Collins* v. *Owen*, 310 F. 2d 884, 887 (8th Cir. 1962); and decision of the Eighth Circuit herein.

Not only did the trial court find that the publication disclosed the invention (R. 50-51), but the trial court expressly denied (R. 52) Petitioner's motion for amended findings and conclusions which alleged that certain elements of the claims are not disclosed by the publication (R. 44-49).

Accordingly, there is no basis in the findings below for Petitioner to assert that the alleged invention is not described by the publication, identically or otherwise.

Invalidating Effect Of References Describing Device Not Yet Successfully Tested Is Settled Law

Petitioner questions whether a reference describing an invention may be relied upon to invalidate a patent, if the device described by the reference has not yet been successfully tested.

This question was answered against Petitioner in *Pickering* v. *McCullough*, 104 U.S. 310, 319 (1881) and *Collins* v. *Owen*, 310 F. 2d 884, 887 (8th Cir. 1962).

Moreover, the portion of 35 U.S.C. 102(b) dealing with publications does not require that the described invention shall have been built or tested.

No Important Legal Issues Presented

It is respectfully submitted that this court customarily exercises its discretion to grant certiorari in cases which present legal issues of public importance, and the present case does not come within such practice. The legal issue which Petitioner attempts to present is a strained construction of 35 U.S.C. 102(b) which has already been considered and rejected by the Eighth Circuit.

CONCLUSION

In view of the foregoing, Respondents request that the Petition For A Writ Of Certiorari be denied.

Respectfully submitted.

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CERTIFICATE OF SERVICE

Three copies of the foregoing Respondents' Brief In Opposition To Petition For A Writ Of Certiorari have been served on Petitioner by mailing said copies first class airmail, postage prepaid, to Petitioner's attorney, Mr. Andrew E. Carlsen, 417 Plymouth Building, Minneapolis 2, Minnesota, this second day of August, 1963.

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